

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
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LYSSETTE MILAGROS SANTIAGO-
ORTIZ,

Plaintiff,

v.

PUBLIC BROADCASTING SERVICE,
et. al.,

Defendants.

Civil No. 12-1964 (JAF)

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7 **OPINION AND ORDER**

8 We must decide whether the plaintiff was an independent contractor during the
9 duration of her employment with the defendant.

10 **I.**
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12 **Background**
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14 Lyssette Milagros Santiago-Ortiz sued several defendants connected to her former
15 employer because she says they discriminated against her on the basis of her age, seniority
16 status, gender, and medical condition, in violation of Title VII, 42 U.S.C. §§ 1981 and 1983
17 and Commonwealth law statutes. She claims the discrimination resulted in her illegal firing.
18 The Public Broadcasting Corporation of Puerto Rico (“PBS”) moves to dismiss the
19 complaint. (Docket No. 56.) The defendants, PR PBS, filed a motion to reconsider on the
20 asserted grounds that we failed to address their Title VII defense that Lyssette Santiago-Ortiz
21 was an independent contractor. (Docket No. 78.) In fact, they raised the independent

1 contractor issue as a defense to Puerto Rico Commonwealth law claims, which we retained
2 through our discretionary authority over pendant claims. We asked the parties for additional
3 briefing on Santiago-Ortiz's hiring status. (Docket Nos. 83 and 86.)

4 II.

5 Legal Standard

6 A. Fed. R. Civ. P. 12(b)(1)

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9 A defendant may move to dismiss an action against her under Federal Rule of Civil
10 Procedure 12(b)(1) for lack of federal subject matter jurisdiction. See Fed.R.Civ.P. 12(b)(1).
11 "When a defendant moves to dismiss for lack of federal subject matter jurisdiction, 'the party
12 invoking the jurisdiction of a federal court carries the burden of proving its existence.'" Johansen v. United States, 506 F.3d 65, 68 (1st Cir. 2007) (citation omitted). Under Rule
13 12(b)(1), there are two types of attacks on jurisdiction: Facial and factual. See Torres-
14 Negron v. J & N Records, LLC, 504 F.3d 151, 162 (1st Cir. 2007). A facial attack alleges
15 that a complaint insufficiently pleads subject-matter jurisdiction. Id. When reviewing a
16 facial attack, a court takes allegations in the complaint as true, just as in a 12(b)(6) motion to
17 dismiss. Id. A factual attack, by contrast, disputes facts alleged in a complaint that support
18 subject-matter jurisdiction. Id. In that instance, there is no presumptive truthfulness. Id.

19 B. Fed. R. Civ. P. 12(b)(6)

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21 A plaintiff's complaint will survive a motion to dismiss if it alleges sufficient facts to
22 establish a plausible claim for relief. See Fed.R.Civ.P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S.
23 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In assessing
24 a claim's plausibility, the court must construe the complaint in the plaintiff's favor, accept all
25 non-conclusory allegations as true, and draw any reasonable inferences in favor of plaintiff.

1 San Geronimo Caribe Project, Inc. v. Acevedo-Vila, 687 F.3d 465, 471 (1st Cir. 2012)
2 (citation omitted).

3 III.

4 Discussion

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7 The plaintiff's ability to bring claims under Title VII depends upon the status of her
8 employment. In Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica, 361
9 F.3d 1 (1st Cir. 2004), the First Circuit made clear Title VII's definition of an "employee"
10 does not include independent contractors and, therefore, independent contractors may not
11 bring Title VII actions against the entities that hire them. Alberty-Velez, 361 F.3d at 6.

12 Terms "employer" and "employee" under Title VII are to be defined with reference to
13 common law agency principles. Lopez v. Massachusetts, 588 F.3d 69, 83 (1st Cir. 2009).
14 Courts may look to the guidelines in the EEOC's Compliance Manual to address the question
15 of when a person is an "employee." Clackamas Gastroenterology Associates, P.C. v. Wells,
16 538 U.S. 440, 448-50 (2003). The EEOC guidelines, in their current form, list the following,
17 non-exhaustive factors as indications that "a worker is in an employment relationship with an
18 employer":

19 "The employer has the right to control when, where, and how
20 the worker performs the job;" "[t]he work does not require a
21 high level of skill or expertise;" "[t]he work is performed on the
22 employer's premises;" "[t]here is a continuing relationship
23 between the worker and the employer;" "[t]he employer has the
24 right to assign additional projects to the worker;" "[t]he
25 employer sets the hours of work and the duration of the job;"
26 "[t]he worker is paid by the hour, week, or month rather than the
27 agreed cost of performing a particular job;" "[t]he worker does
28 not hire and pay assistants;" "[t]he work performed by the
29 worker is part of the regular business of the employer;" "[t]he
30 employer is in business;" "[t]he worker is not engaged in his/her
31 own distinct occupation or business;" "[t]he employer provides

1 the worker with benefits such as insurance, leave, or workers'
2 compensation;" "[t]he worker is considered an employee of the
3 employer for tax purposes;" "[t]he employer can discharge the
4 worker;" and "[t]he worker and the employer believe that they
5 are creating an employer-employee relationship."

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7 2 Equal Employment Opportunity Comm'n, *EEOC Compliance Manual*, § 2-III, at 5716-17
8 (2008).

9 No one factor is determinative, and each factor should be viewed in the context of the
10 particular relationship at issue. See Community for Creative Non-Violence v. Reid, 490 U.S.
11 730, 752 (1989); see also N.L.R.B. v. United Ins. Co. of America, 390 U.S. 254, 258 (1968)
12 ("all of the incidents of the relationship must be assessed and weighed with no one factor
13 being decisive.") However, in most situations, the most important factor will be the extent to
14 which the hiring party controls "the manner and means" by which the worker completes her
15 tasks. See, e.g., Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 114 (2nd
16 Cir. 2000); Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 260 (4th Cir. 1997).

17 Several factors favor classifying Santiago-Ortiz as an employee. First, the method of
18 payment favors classifying Santiago-Ortiz as an employee. Payment for the completion of a
19 specific job or project is the method by which independent contractors are usually
20 compensated. Cf. Creative Non-Violence v. Reid, 490 U.S. 730, 753 (1989)) (quoting Holt
21 v. Winpisinger, 811 F.2d 1532, 1540 (D.C.Cir.1987)). Here, however, Santiago-Ortiz was
22 paid every fifteen days based on a 35-hour work week. Her compensation was not based on
23 the completion of a project, or on the time spent working on a project.

24 Second, PR PBS controlled the manner and schedule of Santiago-Ortiz's work.
25 Santiago-Ortiz is required to attend daily meetings onsite, where her superiors outline and
26 prioritize the manner and method of her work. Employer "control" over the manner,

1 location, and hours of work is critical to hiring status analysis. See Cilecek, 115 F.3d at 260
2 (4th Cir. 1997). Here, this factor favors the conclusion that Santiago-Ortiz is an employee,
3 not an independent contractor.

4 Third, Santiago-Ortiz's five-year relationship with PR PBS favors classifying her as
5 an employee. Longer periods of employment, while not dispositive, generally suggest
6 employee status. See Reid, 490 U.S. at 730. Santiago-Ortiz worked for PR PBS for seven
7 hours a day, five days a week, for five years. She reported daily to the PR PBS facilities,
8 where she attended regularly scheduled meetings and was given direction and supervision on
9 her work. Such facts are distinguishable from the First Circuit precedents in both Speen v.
10 Crown Clothing, Corp., 102 F.3d 625 (1st Cir. 1996), and Dykes v. DePuy, Inc., 140 F.3d 31
11 (1st Cir. 2008), because in both of those cases, despite their long tenures of employment, the
12 plaintiffs had other factors clearly marking them as independent contractors—they were paid
13 on commission; they were undirected in their daily activities; they reported infrequently to
14 the employer; and they received little oversight from their employers. Those factors made
15 the difference in those cases and are not present here. Santiago-Ortiz's five-year relationship
16 implies employee status.

17 Fourth, PR PBS provided the "tools and instrumentalities" necessary for Santiago-
18 Ortiz to perform her job. Santiago-Ortiz works at facilities owned and operated by PR PBS.
19 PR PBS provides Santiago-Ortiz with a computer, desk, and office supplies. PR PBS
20 provides the camera equipment, cameraman, microphones, mobile unit, production
21 assistants, editing machinery, and office supplies that Santiago-Ortiz uses to do her job.
22 These are the most essential tools necessary for her to perform her job, and the fact that PR

1 PBS provided them is further evidence that Santiago-Ortiz works as an employee, rather than
2 as an independent contractor.

3 Santiago-Ortiz contends that we should consider the Puerto Rico State Insurance
4 Fund's determination that she was an "employee" eligible for worker's compensation.
5 (Docket No. 83 at 12-14.) While it is true that the State Insurance Fund employed the same
6 factors in their analysis, we are not bound by the State Insurance Fund's determination of the
7 issue. See Serapion v. Martinez, 119 F.3d 982, 988-89 (1st Cir. 1997) (concluding
8 individual's status as employee under Puerto Rico law is irrelevant to determining whether
9 individual is employee under Title VII).

10 PR PBS asserts in their motion to reconsider that Santiago-Ortiz was an independent
11 contractor based on the terminology used in her contract. (Docket No. 86 at 6.) However,
12 the common-law agency factors do not hinge on the terminology used, but rather on the
13 substance of the employment relationship. As already discussed, the substantive factors
14 point toward concluding that Santiago-Ortiz was an employee, not an independent
15 contractor.

16 PR PBS points to other factors to suggest that Santiago-Ortiz was an independent
17 contractor. For example, PR PBS, relying on Aymes v. Bonelli, 980 F.2d 857 (2nd Cir.
18 1992), contends that Santiago-Ortiz was free to hire her own assistants. However, Aymes
19 makes clear that the freedom to hire assistants is not relevant if the nature of the work
20 requires the hired party to work alone. Here, there is no indication that Santiago-Ortiz ever
21 availed herself of the freedom to hire her own assistants or that her job as a sports reporter
22 required her to hire assistants. PR PBS suggests that because Santiago-Ortiz worked both on
23 and off premises she should be considered an independent contractor. But Santiago-Ortiz's

1 primary responsibility as a sports reporter (or “collaborator”) was to cover sports contests—
2 none of which occurred on PR PBS’ premises.

3 While no one factor is dispositive, it is clear, based on the parties’ representations of
4 their relationship, that a reasonable fact finder could only conclude that Santiago-Ortiz was
5 an employee of PR PBS. The manner in which Santiago-Ortiz was compensated for her
6 work, the length of her tenure, the provision of resources used in her work, and the control
7 over her work exercised by PR PBS all indicate employee status. Accordingly, we conclude
8 that Santiago-Ortiz was an employee as a matter of law and, therefore, can maintain a Title
9 VII action against PR PBS.

10 **IV.**

11 **Conclusion**

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14 For the foregoing reasons, PR PBS’ motion to dismiss Santiago-Ortiz’s Title VII
15 claims, (Docket No. 86), is **DENIED**. Because we retain jurisdiction over Santiago-Ortiz’s
16 Title VII claims, jurisdiction over her supplemental Puerto Rico law claims remains proper
17 under 28 U.S.C. § 1367.

18 **IT IS SO ORDERED.**

19 San Juan, Puerto Rico, this 4th day of February, 2014.

20 S/José Antonio Fusté
21 JOSE ANTONIO FUSTE
22 U. S. DISTRICT JUDGE